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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

FEB 18 2004

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 03-238
Table of Allotments,	)	RM-10820
FM Broadcast Stations	)	
(Lancaster and Pickerington, Ohio)	)	

To: Assistant Chief, Audio Division, Media Bureau

**SUR-REPLY OF FRANKLIN COMMUNICATIONS, INC.**  
**TO**  
**REPLY COMMENTS**

Franklin Communications, Inc. ("Franklin"), licensee of Station WJZA, Channel 278A, Lancaster, Ohio, herein files its Sur-Reply to the Reply Comments filed January 30, 2004, by North American Broadcasting Co., Inc. ("North American") on the *Notice of Proposed Rule Making*, DA 03-3648, released November 17, 2003 ("NPRM") that proposes to (a) reallocate Channel 278A from Lancaster, Ohio, to Pickerington, Ohio and (b) modify the WJZA license to specify operation on Channel 278A at Pickerington, Ohio.<sup>1</sup> The Commission should consider this Sur-Reply on the merits in this proceeding as a matter of due process pursuant to its discretion under Section 1.415(d) of the Commission's Rules. In this Sur-Reply, Franklin addresses *new matters* that have arisen since January 30, 2004, the date on which reply comments were due in this docket. Specifically, North American on February 5, 2004, filed a Petition for Reconsideration of the dismissal of a minor change application (File No. BPH-20011221AAQ) to the

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<sup>1</sup> In a separate pleading filed today, Franklin is seeking leave to file this Sur-Reply.

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facilities of its station WEGE, Westerville, Ohio, while a mutually-exclusive conflicting application (File No. BPH-20040108ALM ) is pending. Not only is North American seeking a waiver for the acceptance of BPH-20040198ALM, it is trying to reinstate a mutually-exclusive application which cannot be granted. That is a violation of Sections 73.3517 and 73.3519 of the Rules.

### **North American's Abusive Conduct**

The purpose of North American's frivolous Petition for Reconsideration is to introduce delay into these proceedings, an abuse of the Commission's processes, which should be brought to the Commission's attention in this docket.<sup>2</sup> Additionally, Franklin takes this opportunity to comment on cases North American cited in its Reply which should be distinguished. *In connection with the above, the following is shown.*

North American is trying to turn this case into a race between North American on the one hand and the licensee of WPAY-FM, Portsmouth, Ohio, on the other. Franklin is a passenger in WPAY-FM's racecar, not the driver, since the fate of WJZA's Pickerington proposal hinges in large part on the status of WPAY-FM. WPAY-FM has until September 26, 2006, to build a Class C facility. North American knows that if a class C facility is not constructed by that deadline, WPAY-FM becomes a Class C0 station. An application for WEGE filed then would be acceptable, however, it would be precluded by WJZA at Pickerington due to its allocation coordinates. To prevent this result, North American embarked on this abusive course in order to protect its two applications in the Commission's database. Otherwise, WJZA, Franklin's station at Pickerington, Ohio, will preclude either of the WEGE defective applications. North

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<sup>2</sup> Franklin is also addressing the abuse aspect of North American's petition in a separate

American is gambling that it can tie this proceeding up in so many knots that the Commission cannot possibly finally dispose of the WEGE applications until September 26, 2006. Additionally, the pendency of the defective WEGE applications in the database preclude WPAY-FM from seeking a transmitter site closer to WEGE's applications or constructing at its existing site, should it be able to obtain FAA clearance. Should the Commission dismiss BPH-20040108ALM and deny reconsideration of the dismissal of BPH-20011221AAQ, North American, if not checked, can file a petition for reconsideration of the dismissal of BPH-20040108ALM and an application for review of the denial of the petition for reconsideration. It can then appeal adverse findings to the courts. This all takes vast amounts of time, to Franklin's prejudice.

In addition to North American's abusive Petition for Reconsideration, its Reply Comments in this docket constitutes a frivolous pleading. North American's proposal in BPH-20040108ALM (and, for that matter, BPH-20011221AAQ) cannot be granted, because the application is a defective counterproposal to Franklin's proposal. North American's application is defective because it severely short-spaces the WPAY-FM licensed facility. North American requested a waiver of Section 73.207 of the rules, but there is no good ground to support such a waiver. North American has failed to cite even one instance where a waiver of Section 73.207 has been granted on similar facts. Plain and simple, the reply comments and North American's petition for reconsideration were interposed for delay.

North American's tactics in attempting to prosecute not one, but two, patently defective applications are apparently designed to keep its applications before the

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Opposition to Petition for Reconsideration being filed today.

Commission until WPAY-FM's Class C construction permit expires or the facility is built at that site, whichever comes first, while illegally restricting WPAY, Inc.'s ability to locate elsewhere its transmitter site. In *Commission Taking Tough Measures against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996) 1996 FCC LEXIS 668, where the Commission stated:

A pleading may be deemed frivolous under 47 C.F.R. § 1.52 if there is no "good ground to support it" or it is "interposed for delay." See also *Implementation of Cable Television Consumer Protection Act*, 9 FCC Rcd 2642, 2657 (1993) (frivolous complaint is one "filed without any effort to ascertain or review the underlying facts" or "based on arguments that have been specifically rejected by the Commission. . . or [having] no plausible basis for relief"). In the past, the Commission generally has issued warnings against the future filing of such pleadings. See e.g., *Western Communications, Inc.*, 59 FCC 2d 1441, 1456 n.21 (1976); *Western Maine Cellular, Inc.*, 7 FCC Rcd 8648 (Mob. Sys. Div. 1992). However, all Bureaus and Offices are encouraged to fully utilize the Commission's sanctions powers, which include the authority to strike such pleadings pursuant to 47 C.F.R. § 1.52 or other applicable rules and to issue forfeitures under 47 U.S.C. § 503 for violations of 47 C.F.R. § 1.52 or other applicable rules. In addition, all Bureaus and Offices are encouraged to refer under seal incidents of attorneys who are found to have filed frivolous pleadings in violation of 47 C.F.R. § 1.52 to the Office of General Counsel pursuant to our decision in *Opal Chadwell*, 2 FCC Rcd 3458 (1987). See *Order*, 10 FCC Rcd 10330 (1995) (codifying the procedures concerning attorney misconduct previously announced in *Opal Chadwell*). The General Counsel will determine the appropriate action to be taken. Such action might include initiation of a proceeding under 47 C.F.R. § 1.24 (censure, suspension or disbarment of attorneys practicing before the Commission), referring the matter to the appropriate state bar, or consulting with the Department of Justice. See *Opal Chadwell*, 2 FCC Rcd at 3458.

The Commission should truly take a "tough measure," use this opportunity to enforce its policy. It should (1) promptly dismiss or return as unacceptable North

American's minor change application for WEGE (BPH-20040109ALM); (2) grant Franklin's proposal at its preferred reference coordinates<sup>3</sup>; (3) deny North American's Petition for Reconsideration; and (4) sanction North American for its abusive conduct in this case.

### **Comment on North American Citations**

At footnote 6, North American cites three cases for the proposition that the Commission has a policy of attempting to resolve conflicts between a petition and a conflicting cut-off FM application by imposing a site restriction on the rule making petition ("The staff will also attempt to resolve conflicts between a rule making petition and a later-filed FM application by imposing a site restriction on the proposal in the petition, or by allotting an alternate channel for that proposed in the petition, whenever it is possible to do so without prejudice to the timely filed FM application or the rulemaking petition." [emphasis added]) North American has ignored the emphasized phrase. To accept North American's proposal would result in a loss of population to WJZA of at least **182,765** potential listeners and would reward North American for its abusive tactics. The cases North American cited are easily distinguishable and do not support North American's position.

In *McCook, Alliance, Imperial, Nebraska and Limon, Parker, Aspen, Avon, and Westcliffe, Colorado*, 16 FCC Rcd 8910 (2001), the Commission announced in its Notice of Proposed Rule Making that it would impose a site restriction on the allotment of

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<sup>3</sup> It is well established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. See Section 1.420 (d) of the Commission's Rules, *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988) and *Springdale Arkansas et al.*, 4 FCC Rcd 674 (1989), *recon.*, 5 FCC Rcd 1241 (1990).

Channel 271C1 to McCook, Nebraska, because of a previously filed application for the use of Channel 272C1 at Kearney, Nebraska, by the licensee of KRNY. The McCook allotment was one for a sixth local service to McCook, not a proposal for first local service to Pickerington. And, unlike the instant case, the site restriction was not suggested by the McCook proponent, and nothing would be lost to that proponent because it did not have an operating station that would be prejudiced by the site restriction.

*Warrenton, Georgia*, 6 FCC Rcd 5174 (1991), is similarly inapposite. In that case, a site restriction was imposed on the proposal to substitute Channel 226C3 for 226A at Warrenton, Georgia. The Warrenton reference coordinates conflicted with an application filed by the licensee of WEAS, Channel 226C1, Savannah, Georgia. WEAS showed that “due to the waterfront location of its antenna and guying limitations, a substantial increase in antenna height is not possible at the current site.” WEAS represented that “all of the tall towers in Savannah are clustered together in a small area west of WEAS’s licensed site on an ‘antenna farm’”. Additionally, WEAS claimed that, due to Federal Aviation Administration considerations, any increase in the height of its antenna would require that the antenna be located in the antenna farm area.” In other words, WEAS showed that its existing site was unusable and that its preferred site was unique. North American has offered no evidence whatsoever that it cannot continue to use its existing site to provide city-grade coverage to Westerville, or that the site it proposes to use is unique. *On information and belief, the proposed WEGE site is behind a church and would require the construction of a new tower. It is not in an existing antenna farm. Moreover, the Warrenton, Georgia, case clearly supports Franklin’s*

position (“Although we are **not required** to accommodate the site preferences of an applicant in a rule making proceeding, we will do so when possible.”) The Commission is not required to accommodate North American’s site preference, especially where great prejudice to Franklin would result.

Finally, North American cites *Saltville, Virginia and Jefferson, North Carolina*, 10 FCC Rcd 7568 (1995), which is also easily distinguishable. Although North American quotes a portion of the footnote where the Commission expressed its policy to “attempt, where possible, to eliminate conflicts between coordinates specified by parties,” it fails to note that this case was decided prior to the adoption of *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. denied*, 11 FCC Rcd 5234 (1996). Moreover, North American did not provide any evidence that the proponent of the Jefferson, North Carolina, proposal, objected to the change in its reference coordinates. WMMY, Jefferson, NC, is licensed to a rural community in the North Carolina mountains and the relocation of the reference site there could not equate to the population loss that WJZA would experience if North American’s abusive proposal is countenanced. The cases are entirely distinguishable.

In short, there is no compelling reason for the Commission to impose a site restriction on the Pickerington, Ohio, allotment for WJZA. Not only is North American’s conduct abusive in attempting to maintain multiple conflicting applications, but the cases cited by North American do not provide support for its theory that the Commission is obligated to impose a site restriction in cases of this type.

### **Conclusion**

As previously shown, Franklin's proposal for first local service to Pickerington at the reference coordinates specified in the NPRM is comparatively superior to North American's application to merely increase WEGE's population coverage; the WEGE application is not entitled to comparative evaluation because it is defective as it short-spaces the licensed facilities of WPAY-FM, and the WEGE application should be returned as an unacceptable counterproposal.

**FRANKLIN COMMUNICATIONS, INC.**

By: 

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February 18, 2004



## CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, hereby certify that copies of the foregoing Reply Comments were this 18th day of February, 2004, sent via First Class Mail, postage pre-paid (or by hand delivery, if so indicated), to the following:


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